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JUL 22 1994

FCC
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Reexamination of the Policy
Statement on Comparative
Broadcast Hearings

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GC Docket No. 92-52
RM-7739, RM-7740,
RM-7741

To: The Commission

COMMENTS

SBH Properties, Inc., an applicant for a new FM broadcast station to serve Tusculum, Tennessee (BPH-920123MD), by counsel herewith submits its Comments in response to the Commission's Second Further Notice of Proposed Rulemaking (FCC 94-167), released June 22, 1994, as follows:

1. In its Second Further Notice the Commission seeks comment on how the Commission can comply with Bechtel v. FCC, 1 F.3d 875 (D.C. Cir. 1993), which ruled unlawful the integration of ownership into management criterion, which the Commission had utilized in deciding comparative cases.

2. The Commission seeks comment on what objective and rational criteria can be used to evaluate applicants' comparative qualifications in light of Bechtel. In that regard the Commission has requested that commenters address the issue of the impact of Bechtel on the continued utilization by the Commission of the existing comparative factors of local residence, participation in local civic activities, minority status and broadcast experience,

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each of which, since 1965, have been considered to enhance integration.

3. As an initial matter, nothing in Bechtel indicates that the Commission cannot continue to decide cases on the basis of those comparative factors. Indeed, the Court in Bechtel attacked the integration policy in part because it had been applied in that case to preclude Ms. Bechtel from receiving comparative credit for her otherwise relevant residence and civic participation. Bechtel at 12. Thus, inasmuch as Bechtel does not indicate that the Commission cannot continue to consider the comparative factors of comparative coverage, broadcast record, residence, civic participation, minority ownership or broadcast experience, it affords the Commission no basis for modifying those comparative factors or the weight accorded them.

4. Secondly, as the Commission recognized in its Notice of Proposed Rulemaking ("NPR") in this proceeding, there exists no inherent impediment to applying the existing comparative factors residence, civic participation, minority ownership or broadcast experience, in the absence of the integration criterion, which it had already proposed to eliminate. NPR at 2672. Furthermore, with the exception of the minority preference, all of the comparative factors pre-date the Commission's Policy Statement on Comparative Broadcast Hearings, 1 FCC2d 393 (1965) and, prior to its adoption in 1965, were accorded credit without regard to integration. Accordingly, inasmuch as they have previously been applied by the Commission without regard for integration, any

contention that they are fundamentally dependent upon integration or that integration credit is a prerequisite to their application must be rejected, as must any contention that their continued application has been undermined by Bechtel.

5. Therefore, inasmuch as Bechtel affords no basis for modifying the existing comparative factors (with the exception of the integration criterion) or the weight accorded them, and inasmuch as the continued application of the existing comparative factors is in no manner dependent upon the integration criterion, there exists no impediment to the continued application of those criteria and they should continued to be applied. This is especially the case with respect to all pending proceedings, where applicants have filed and prosecuted their applications with settled expectations regarding the criteria upon which their cases are to be decided. Therefore, until and unless the existing comparative factors are ruled unlawful by the Courts, the Commission should continue to apply them consistently and without modification in all pending cases.

6. While the Commission now seeks comment on the procedural ramifications of applying a revised comparative analysis to pending cases, it represented in the NPR its intention to "apply the revised criteria to all applicants not in hearing as of the effective date of our action in this proceeding." NPR at 2669. Furthermore, at Note 17 to the NPR the Commission indicated that the application of comparative criteria in all pending cases would be addressed through adjudication, on a case by case basis.

NPR at 2672. While the Commission suggested that it had the authority to apply revised comparative criteria to pending cases, Multi-State Communications, Inc. v. FCC, 728 F.2d 1519 (D.C. Cir. 1984), which the Commission cited, does not support its position in this regard. The application of modified comparative factors to pending cases is not analogous to the prospective application of newly promulgated rules, which was the issue addressed in Multi-State Communications. On the contrary, the application of modified comparative criteria to pending cases is more properly analogous to the improper application of an ex post facto law.

7. In addition to the Constitutional problems inherent in the application of modified comparative criteria to pending cases, there is also a practical concern. The Commission has long recognized that the public interest is served through expedition of the licensing process and disserved by unduly lengthy proceedings. Thus, the Commission must consider the fact that any attempt to apply modified comparative criteria to pending cases would result in significant delay, inasmuch as further evidentiary proceeding would be required with the attendant delays of discovery, hearings and subsequent appeals. In a pending proceeding this could add years to the resolution of a proceeding, which may have already consumed a number of years. Accordingly, both the rights of the applicants and the interest of the public in an expeditious resolution of pending proceedings requires that only existing criteria be applied.

8. The Commission has requested that commentors indicate under what circumstances it would be appropriate to permit applicants in pending cases to amend their proposals in light of newly adopted standards and when further evidentiary proceedings would be warranted. As indicated above, the existing criteria must continue to be applied in pending cases. Accordingly, no opportunity to amend should be permitted with respect to applicants in pending proceedings.

9. In the NPR the Commission also requested comment on whether the Anax Doctrine should be retained, noting that it had previously concluded that it would be desirable to reduce the "burdensome litigation" that Anax had spawned "by modifying or eliminating the Anax Doctrine." NPR at 2672 (Note 10). It is abundantly clear that the Anax Doctrine should be abolished, not only because of the fact that it has lead to "burdensome litigation," but because, as reflected in the Court's decision in Bechtel, the application of the Anax Doctrine in comparative proceedings results in decisions which are inherently arbitrary and capricious. Indeed, inasmuch as one of Ms. Bechtel's primary bases for challenging the Commission's integration criterion was its application of the Anax Policy, ¹/ the Court's decision in Bechtel must be read as undermining the Commission's continued reliance upon the Anax Policy. Accordingly, it should be abolished.

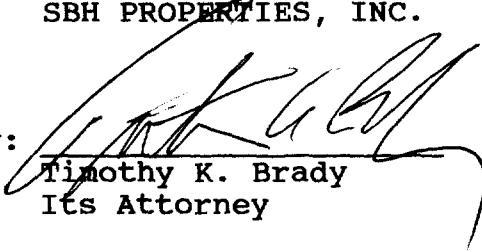
1. See: Susan M. Bechtel v. FCC, 957 F.2d 873, 879-80 (D.C. Cir. 1992)

WHEREFORE, for the foregoing reasons, the Commission should promptly lift the current "freeze" and direct that the existing comparative criteria, excluding integration, be applied in all pending cases.

Respectfully Submitted,

SBH PROPERTIES, INC.

By:


Timothy K. Brady
Its Attorney

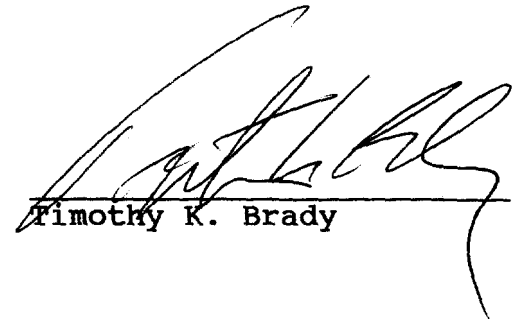
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July 22, 1994

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have, this 21st day of July, 1994, served a copy of the foregoing Comments by First Class mail, postage prepaid upon the following:

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Timothy K. Brady